IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMMY BIANEZ CHAVEZ, Appellant, v. LAWRENCE E. WILSON, WARDEN, Appellee.	)	No. 22697

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of California

DERALD E. GRANBERG
Deputy Attorney General

TIMOTHY A. REARDON
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-0201

Attorneys for Appellees

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Proceedings in State Courts

On November 17, 1964, in case number 291603, appellant entered a plea of guilty to the charge of violating Penal Code section 666 (petty theft with a prior petty theft conviction), a felony, and admitted an

additional prior felony conviction (TR 57).

On February 1, 1965, in case number 296774, appellant entered a plea of guilty to the charge of violating Health and Safety Code section 11500.5 (possession of narcotic other than marijuana for sale), a felony, with a prior narcotics conviction and an additional felony conviction being found true (TR 63).

On February 23, 1965, appellant was sentenced on each conviction to state prison for the term prescribed by law. The sentences were ordered to run concurrently (TR 41-42).

Appellant appealed from the aforementioned judgments and on August 9, 1966, the Court of Appeal, Second Appellate District, Division Two, affirmed the judgments of conviction in case number 10976. On October 7, 1966, a petition for habeas corpus relief was filed in the Marin Superior Court and was denied April 3, 1967, in case number 46665. Four days later, a similar petition was filed in the Court of Appeal, First Appellate District, Division One. On April 12, 1967, said petition was denied in case number 6340. Petition for habeas corpus relief was then filed in the California Supreme Court in case number 11060. On May 24, 1967, said petition was denied.

Proceedings in the Federal Courts

Appellant petitioned the United States District Court for a writ of habeas corpus on September 29, 1967 (TR 1). As in his petitions to the state courts, appellant made no attack on the conviction in case number 291603 (petty theft with a prior petty theft conviction). He did challenge, however, the validity of the conviction in case number 296774 (possession of narcotic other than marijuana for sale) on the following grounds: (1) that he was denied effective assistance of counsel; (2) that his plea of guilty was not freely and intelligently entered; (3) that the trial judge failed to apply his discretion to the issue of appellant's eligibility for commitment to the Narcotics Rehabilitation Center (TR 5, 12-23). In an order filed December 14, 1967, the District Court, deciding the cause on its merits, denied the petition (TR 139-145).

On March 8, 1968, petition for rehearing (TR 146-151) was denied (TR 152). Appellant's application for a certificate of probable cause and leave to appeal in forma pauperis was granted on this same day (TR 151-152). Notice of appeal was filed March 20, 1968 (TR 158).

APPELLANT'S CONTENTIONS

1. Appellant was denied effective assistance of counsel.

2. The trial court erred in accepting appellant's

plea of guilty.

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant was not denied effective assistance of counsel.

II. Appellant's allegation that the trial judge did not adequately examine into his plea of guilty fails to state grounds for relief.

ARGUMENT

I

APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In support of his contention that he was not adequately represented, appellant alleges (1) that although he "believed he had a good defense," trial counsel did not discuss the matter of defenses with him, and (2) that he was not apprised by counsel of the consequences of his guilty plea (AOB 8).

Before a court can grant federal habeas corpus relief in response to such a claim, a showing must be made that the representation was so ineffective that the proceeding was reduced to a farce or sham. Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967); Grove v. Wilson, 368 F.2d 414 (9th Cir. 1966). The record in this case precludes any such showing and affirmatively establishes that petitioner was ably represented.

The reporter's transcript of the preliminary

hearing (TR 69-101) demonstrates that appellant received competent representation by the public defender, who thoroughly cross-examined prosecution witnesses and explored all facets of the illegal sale and appellant's subsequent arrest. The vague and conclusory allegation that counsel failed to discuss with appellant possible defenses lacks sufficiency as a basis for granting relief. This barren allegation assumes the existence of some defense and requires this court to impute to counsel an act of incompetence in neglecting to present an unnamed defense or willfully bypassing the same. Although appellant claims he "believed" he had a defense, he fails to state what it was. The record establishes that appellant was ably represented and he has failed to present any facts supporting a different conclusion. See Barquera v. California, 374 F.2d 177 (1967).

The record also belies appellant's contention that he was not apprised by counsel of the consequences of his plea. At the time appellant withdrew his plea of not guilty and entered his plea of guilty, the following dialogue took place.

"THE COURT: Are you changing your plea freely and voluntarily without threat or fear to yourself or anyone else closely related to or associated with you?

"THE DEFENDANT: Yes, sir.

"THE COURT: Has anybody made you any promises of a lesser sentence, probation, reward, immunity or anything else in order to induce you to plead guilty?

"THE DEFENDANT: No. sir.

"THE COURT: Do you understand the matter of probation and sentence is to be determined solely by this Court?

"THE DEFENDANT: Yes.

"THE COURT: Are you pleading guilty because in truth and in fact you are guilty and for no other reason, is that correct?

"THE DEFENDANT: Yes." (TR 115-116)

This record clearly supports the finding that appellant knew that he could be sentenced to state prison for the crime he had committed and that he had been previously so advised by counsel. Faced with this record, appellant not only fails to explain the apparent conflict between the answers he gave at that time and his present contention, but affirmatively cites this portion of the record in support of his appeal (AOB 9).

Appellee submits that the allegations regarding the incompetency of counsel are refuted by the trial court record and, in any event, fail to state sufficient facts warranting relief.

II

APPELLANT'S ALLEGATION THAT THE TRIAL JUDGE DID NOT ADEQUATELY EXAMINE INTO HIS PLEA OF GUILTY FAILS TO STATE GROUNDS FOR RELIEF.

Appellant contends that the trial judge did not adequately examine him to determine whether his plea was knowingly and voluntarily entered. Rather than alleging that his plea was in fact involuntary and stating facts in support thereof, appellant confines his attack to the examination conducted by the trial judge and relies solely upon the state court record to support this proposition.

It is well settled that a habeas corpus petitioner must allege a recognizable ground for relief and support said allegation with specific facts. Schlette v. California, 284 F.2d 827 (9th Cir. 1960); Egan v. Teets, 251 F.2d 571 (9th Cir. 1958); Osborne v. Johnston, 120 F.2d 947 (9th Cir. 1941). The allegation that a trial judge in a state court failed to conduct an adequate examination at the time plea was entered, without an allegation that the plea was involuntary or entered without knowledge of the consequences, fails to state grounds for habeas corpus relief. See Waddy v. Heer, 383 F.2d 789 (6th Cir. 1967); Smith v. Hendrick, 260 F. Supp. 235 (E.D. Pa. 1966); see also Gilmore v. California, 364 F.2d 916 (9th Cir. 1966). The relevant inquiry is whether

appellant knowingly and voluntarily entered his plea of guilty, and without any allegation to the contrary, there is no basis upon which the district court could act. In any event, the above-quoted dialogue preceding the entry of plea clearly demonstrates, as the District Court so found, that the trial judge made a full and complete inquiry into appellant's desire to plead guilty and the consequences of said plea. Appellant's responses to the questions from the bench, which are not refuted or explained by the appellant, disclose that said plea was made knowingly and voluntarily. In addition to this thorough examination by the trial judge, appellant was represented throughout the proceedings and at the time of plea by counsel, was advised of his rights and the charges against him, and entered the plea on advice of counsel (TR 113-116). He fails to state any facts supporting the general allegation that his plea was involuntary.[1/]

Since appellant fails to state any facts supporting his contention and relies solely upon the state court

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1. It is significant to note that approximately three months prior to the entry of plea, appellant plead guilty in case number 291603 (TR 57). The examination conducted by the trial judge in that case was similar to the examination presently under attack (TR 106-108). Appellant does not challenge the validity of the plea entered in case number 291603, but would have this court set aside his subsequent plea solely on the basis of a substantially similar record.

record, the District Court correctly determined that the record refuted appellant's contention of an involuntary and unknowing guilty plea and properly denied the petition without an evidentiary hearing.

Appellant's contention that the District Court erred in failing to determine if his case was an exception to the McNally v. Hill, 293 U.S. 131 (1934) doctrine is frivolous since his petition was denied on the merits.

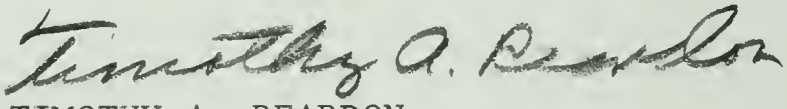
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying appellant's petition for the writ of habeas corpus be affirmed.

DATED: May 3, 1968

THOMAS C. LYNCH, Attorney General
of California

DERALD E. GRANBERG
Deputy Attorney General



TIMOTHY A. REARDON
Deputy Attorney General

Attorneys for Appellee

CR-SF
67-1527
TAR/gb

CERTIFICATE OF COUNSEL

I certify that in accordance with the prepera-tion of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: May 3, 1968

Timothy A. Reardon

TIMOTHY A. REARDON
Deputy Attorney General
of the State of California